Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978
No. 77-1052

EDWARD BUTKER,

Petitioner,

vs.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

	Page
Table of Authorities	ii
PETITION FOR WRIT OF CERTIORARI	1
ORDER BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF FACTS	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	14
APPENDIX "A"	
APPENDIX "B"	

TABLE OF AUTHORITIES

Cases	Page
Kwock Jan Fat v. White, 253 U.S. 454, 40 S.Ct. 566	5
Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906	6, 7
People v. Lockheed Shipbuilding & Construction Co., 35 Cal.App.3d 776, 111 Cal.Rptr. 106	7 7
Stewart v. County of San Mateo, 246 Cal.App.2d 273, 54 Cal.Rptr. 599	7
Walsh v. Kirby, 13 Cal.3d 95, 118 Cal.Rptr. 1	8

Constitutions

California Constitution, Article XX, §22	11
United States Constitution:	
Fifth Amendment	3
Fourteenth Amendment	3, 4

Statutes

California Business and Professions Code:	
Section 23080	10, 11
Section 23081	10
Section 23090	11
Section 23095	4, 5, 9 12, 13
28 U.S.C. §1257(3)	2

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The Petitioner, Edward A. Butker, prays that a Writ of Certiorari issue to review the order of the California Supreme Court rendered December 22, 1977.

ORDER BELOW

The order of the Court of Appeal appears at Appendix B, infra, p. 16. The California Supreme Court Order was a denial of a petition for Writ of Review of the Alcoholic Beverage Control Appeals Board administrative decision over which the Court of Appeal and the California Supreme Court have original jurisdiction.

JURISDICTION

The order of the California Supreme Court was entered December 22, 1977. See Appendix A, infra, p. 15. On November 22, 1977, the California State Court of Appeal, Second Appellate District issued an order denying a Writ of Certiorari on the order of the Alcoholic Beverage Control Appeals Board issued on October 20, 1977. See Appendix B, infra, p. 16. This Petition for Certiorari is filed less than 90 days from the date of the order of the California Supreme Court. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

---

1. Whether Due Process of Law was denied when the Department of Alcoholic Beverage Control renders a decision affecting the status of a license for the sale of alcoholic beverages,

and in fact sustains the suspension of said license without a hearing or any procedural due process of law;

2. Whether Respondent violated the Due Process Clause of the United States Constitution in suspending a license without adhering to statutory provisions guaranteeing Due Process of Law in Appellate Review of Departmental action;

3. Whether Respondent violated the Due Process Clause of the United States Constitution when it deemed waived Petitioner's rights to appellate and judicial review of departmental action where there has been no such waiver.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition presents issues concerning the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF FACTS

On December 22, 1976, the Appeals Board affirmed a decision of the Department of Alcoholic Beverage Control. A petition for hearing in the California Supreme Court was denied on March 31, 1977.

Petitioner, pursuant to Business and Professions Code §23095, on June 2, 1977, submitted to the Department a Petition to Make Offer of Compromise.

On June 13, 1977, the Hearing and Legal Unit of the Department of Alcoholic Beverage Control received the petition. On June 14, 1977, the petition was denied. Petitioner filed with the Alcoholic Beverage Control Appeals Board an appeal of the dismissal. On October 20, 1977, on written motion of the Department, the Appeals Board dismissed the appeal. No hearing on the merits of the petition was heard. It was from this order dismissing the appeal that petitioner brought a Petition for Writ of Review to the Court of Appeal, Second District, Division 3.

On December 1, 1977, a Petition for Writ of Review was filed in the California Supreme Court. On December 22, 1977, a hearing was denied. See Appendix A, infra, p. .

REASONS FOR GRANTING THE WRIT

1. The Fourteenth Amendment to the United States Constitution guarantees Due Process of Law. Petitioner was denied procedural due process. Petitioner was subjected to a departmental determination which precluded him from compromise of a suspension of his license. No hearing on the merits of the Petition to Compromise was held despite petitioner's request that the matter be heard in a fair procedure.

The Department, pursuant to Business and Professions Code §23095, which reads in pertinent part:

> "Upon the receipt of such a petition, the department may stay the proposed suspension and cause such investigation to be made as it deems desirable and may grant such petition if it is satisfied (a) that the public welfare and morals would not be impaired by permitting the licensee to operate during the period set for suspension and that the payment of the sum of money will achieve the desired disciplinary purposes; (b) that the books and records of the licensee are kept in such a manner that the loss of sales of alcoholic beverages which the licensee would have suffered had such suspension gone into effect can be determined with reasonable accuracy therefrom,"

received petitioner's offer to compromise and reached a decision thereon.

Specific findings of fact, i.e., the impairment of public welfare and morals are necessitated by this code section. Due process requires a guarantee of fundamental fairness to the licensee. Such fairness is protected by the courts by judicial review to insure procedural due process.

The United States Supreme Court in Kwock Jan Fat v. White, 253 U.S. 454, 458, 40 S.Ct. 566 (1920) in reviewing the procedure of the Secretary

of Labor in excluding Chinese persons from entrance to the United States, reversed the Secretary's determination because his authority was not fairly exercised,

> "* * * that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. * * * The decision must be after a hearing in good faith. * * *"

Later, the Supreme Court in Morgan v. United States, 298 U.S. 468, 480, 56 S.Ct. 906 (1936) required a due process hearing on the fixing rates of market agencies:

> "That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence to support pertinent and necessary finds of fact."

The Court also stated:

> "The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action."

In this case, the Department in a statement placed on a printed form made the bare, unsupported declaration that certain necessary findings could not be made, concluding that the Petition to Compromise was denied. There was no adjudication. There was no judicial or quasi-judicial process for review. There were no safeguards as required in such a determination by Morgan v. United States, supra.

The California Court of Appeal in People v. Lockheed Shipbuilding & Construction Co., 35 Cal. App. 3d 776, 111 Cal. Rptr. 106 (1973) held that administrative proceedings which provide inadequate methods of review are lacking in due process.

The court distinguished quasi-legislative administrative hearings from quasi-judicial administrative hearings and held that quasi-judicial administrative hearings must have procedural due process.

The Court in Stewart v. County of San Mateo, 246 Cal. App. 2d 273, 285, 54 Cal. Rptr. 599 (1966), stated a position exactly applicable to the case before this Court:

> "We note first that it is firmly established that the right of every person to engage in a legitimate employment, business or vocation is an individual freedom secured by the due process provisions of the federal and state Constitutions."

The Court therein concluded that:

> ". . . where the revocation proceedings are quasi-judicial in nature, due process of law requires an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked."

The due process protection and its necessity are underlined in this case where the Department, at the time the accusation was filed, determined that the petition to compromise, if submitted in the future, would be denied. No hearing on the accusation itself had taken place when that determination was made. Such unbridled, unfettered, unchecked authority and power is repugnant to the most fundamental precepts of due process.

In Walsh v. Kirby, 13 Cal. 3d 95, 106, 118 Cal. Rptr. 1 (1974), the California Supreme Court stated:

> "When, as here, a governmental entity vested with broad administrative powers acts in an arbitrary manner so as to affect capriciously the property or property rights of persons subjected to its administrative control it has denied to those persons due process of law."

Without an evidentiary hearing, without a review by the Appeals Board and with no judicial review, the Department was left in precisely the position to do that which the California Supreme Court sought to prohibit in Walsh, supra: the

exercise of broad administrative power in an arbitrary manner. Respondent therein denied petitioner due process of law.

2. Procedural due process of law is guaranteed by statute in administrative procedure in the State of California. Respondent, in ignoring this statutory scheme, denied petitioner due process of law.

California Business and Professions Code §23095 provides that a licensee may petition the Department for offer to compromise where the Department has rendered a decision suspending a license for 30 days or less, where the decision has become final. Such is the case here. The licensee in submitting the petition is asked to waive appellate and judicial review of the specific decision of the Department suspending the license.

The waiver reads in full:

> "IN PRESENTING THIS PETITION TO THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, I HEREBY DECLARE THAT I WAIVE ALL RIGHTS TO APPEAL AND JUDICIAL REVIEW OF THE DEPARTMENT'S DECISION SUSPENDING MY LICENSE IN THE ABOVE-NOTED REGISTERED CASE" (emphasis added).

Nowhere in this waiver is there reference made to any decision except that decision which actually suspended the license. Certainly no reference is made to future decisions the

Department may render.

The form letter petitioner received denying the offer to compromise was entitled "Notice of Action on Petition to Make Offer in Compromise." By statutory definition, this denial is another "decision." It is a new and different decision.

California Business and Professions Code §23080 defines decision as being

> "* * * any determination of the department imposing a penalty assessment or affecting a license which may be appealed to the board under Section 22 of Article XX of the Constitution."

When the Department reached a decision not to allow a compromise, such decision undeniably affected the status of the license and therefore was appealable to the board. In denying the appeal to the board, the board stated that this appeal was:

1. waived; and
2. nonexistent.

Such conflicting positions reflect an acknowledgment on the part of the board that the decision in question was appealable. The question of waiver is discussed, infra.

Section 23081 provides in pertinent part:

> "* * * any party aggrieved by a final decision of the department may file an appeal with the board from such decision."

The statutory guarantee was ignored by respondent.

Upon the final order of the Appeals Board dismissing the appeal, petitioner seeks relief from this Court pursuant to Business and Professions Code §23090 which provides, in part:

> "Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order."

In defining decision, §23080 refers to California Constitution, Article XX, §22, which states that in:

> "* * * a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision. * * *"

The petition to compromise, if accepted, would have effected a change in the status of the license, as a penalty would have been imposed of $500.00. The denial of the petition to compromise also affected the status of the license. A suspension will follow this unguided, unreviewed decision of the Department.

Petitioner was merely asking that the Appeals Board follow statutory procedure in the hope that substantial justice will be achieved.

Respondent has ignored the statutory procedure for appeal and judicial review. In so doing, respondent has not conformed with the legislative implementation of the constitutional guarantee of due process.

3. Respondent has deemed waived petitioner's right of appellate and judicial review where no such waiver was effected or intended by petitioner.

California Business and Professions Code §23095 leaves the decision of whether or not to file a petition to compromise to the licensee and does not require a waiver of his right of having the Appeals Board to review the determination of the Department. Petitioner contends that by affixing his signature to the printed form waiver, he waived all right of review and judicial intervention of the Department to suspend the license, not to review the decision on the petition to compromise.

The waiver in question reads:

> "In presenting this petition to the Department of Alcoholic Beverage Control, I hereby declare that I waive all rights to appeal and judicial review of the Department's decision suspending my license in the above-noted registered case."

The Department's decision suspending the license came on December 22, 1976. The only interpretation of the language of the waiver is that reference is made only to that decision of December 22, 1976. Petitioner has stated under penalty of perjury that he did not intend to waive any rights of judicial review or appeal of the Department's action on the petition to compromise.

Petitioner, understanding that the form waiver existed to preclude review of the actual suspension, not the subsequent determination by the Department on the compromise petition, signed the waiver.

Respondent apparently decided that "decision" in the waiver refers to the petition to compromise, but that "decision" in California Business and Professions Code §23095, does not pertain to the petition to compromise. Such contradictory arguments are untenable, both individually and when read together.

Petitioner contends that the language of the waiver and California Business and Professions Code §23095, when left untortured and read properly, provide petitioner with the right of judicial review of the petition to compromise and that said right was not waived by petitioner.

In the waiver, the language stands: "decision suspending my license."

In §23095, "decision" has a definition provided by §23080 and is much broader. This, by clear language, includes any determination affecting a

license. It cannot be argued that a denial of a petition to compromise is a decision which does not affect a license.

Considering the words in the contexts in which they appear, the only logical conclusion is that petitioner, understanding that he had a right to judicial and appellate review of a petition to compromise, and understanding that he was waiving review of the Department's decision actually suspending his license, signed the waiver, never believing or intending that he would be precluded from due process safeguards on the petition to compromise determination by the Department.

In deeming waived the right of appellate and judicial review provided by the State and Federal Constitution and the statutory scheme applicable and deri ed therefrom, respondent denied petitioner due process of law.

CONCLUSION

For the above-stated reasons, this Petition for Writ of Certiorari should be granted. Petitioner, further, requests an oral argument on this petition.

Dated: January 24, 1978

Respectfully submitted,

STEPHEN WARREN SOLOMON, INC.

STEPHEN WARREN SOLOMON

Attorneys for Petitioner

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

DEC 22 1977

I have this day filed Order

In re: 2 Civ. *No.* 52366

Butker

vs.

Alcoholic Beverage Control
Appeals Board

Respectfully,

G. E. BISHEL
Clerk

85322-877 10-77 SM OSP

APPENDIX "A"

15.

POST CARD

(Nov. 22 '77)

Clerk's Office
Court of Appeal
Second District

3580 Wilshire Boulevard
Suite 301
Los Angeles, CA 90010

STEPHEN WARREN SOLOMON

330 WASHINGTON ST. #601

MARINA DEL REY. 90291, California

Los Angeles, Cal. Nov. 22 1977

Title (BUTKER) vs. (A.B.C.) No. 52366

THE COURT: PETITION FOR WRIT OF CERTIORARI IS DENIED.

Clay Robbins, Clerk

APPENDIX "B"
16.

Supreme Court, U. S.
FILED
JAN 31 1979

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Petitioner

FILED
October 20, 1977
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

BEFORE THE ALCOHOLIC BEVERAGE
CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation	) AB-4293a
	) File 40512; Reg. 3551
Against	) ALJ: Green
	)
EDWARD A. BUTKER	) Date and Place of
dba The Bucket	) Hearing:
10909 Hawthorne Boulevard	) July 28, 1977
Lennox	) 314 West First Street
	) Los Angeles, California
Respondent and Licensee	)
	) For Department:
On-sale beer and wine license	) Honorable Evelle J.
	) Younger, Attorney
Under the Alcoholic Beverage	) General
Control Act.	) Richard Radosh
	) Deputy Attorney General

For Appellant:
Stephen Warren
Solomon, Esq.

The Department of Alcoholic Beverage Control has filed a motion to dismiss the appeal in this case upon the ground that the Appeals Board lacks jurisdiction.

Pursuant to the provisions of section 23095 of the Alcoholic Beverage Control Act, appellant petitioned the department for permission to make an offer in compromise, viz.: to pay a fine rather than serve the period of suspension provided for in the department's decision. By statute, such a petition may be filed with the department only when the department's decision has become final; that is, as a prerequisite to filing such a petition with the department, the licensee's right of appeal must have been exhausted, or the licensee has failed to exercise same (Business and Professions Code section 23095[1]).

1/ Business and Professions Code section 23095 provides in pertinent part:

> "Whenever a decision of the department suspending a license for 30 days or less becomes final, whether by failure of the licensee to appeal the decision or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of such suspension, petition the department for permission to make an offer in compromise, to be paid into the Alcohol Beverage Control Fund, consisting of a sum of money in lieu of serving such suspension."

Settlement of a pending matter is provided by Business and Professions Code section 23087, which states:

> "Whenever any matter is pending before the board or a court of record involving a dispute

(continued on p. 3)

The department, by use of Form No. ABC-162, wherein appellant expressly waives his right of appeal, permits an offer in compromise to be filed pursuant to the provisions of Business and Professions Code section 23095 prior to the time contemplated therein; viz.: the decision of the department having become final (1) by failure of the licensee to appeal the decision, or (2) by exhaustion of all appeals. This has the effect of causing the department's decision to become final. Such action may be motivated by the desire of some licensees who do not wish to appeal the decision of the department and, thus, not wait until the appeal time has run before seeking a monetary settlement in lieu of a suspension. It would appear the utilization of such a procedure, under the above-described circumstances (the time for filing an appeal not yet having expired), places a burden upon the department to be certain that the licensee is clearly apprised of the fact that: (1) he is thereby waiving his right of appeal, and (2) there is no commitment by the department to accept the offer presented.

1/ (continued from previous page)

> between the department and a licensee, petitioner or protestant and the parties to such a dispute agree upon a settlement or adjustment thereof, the tribunal shall upon the stipulation by the parties that such an agreement has been reached, remand the matter to the department."

The history of the instant case is that the Appeals Board had affirmed the decision of the department with regard to the instant violations on December 22, 1976. A Petition for Hearing was denied by the California Supreme Court on March 31, 1977. The petition now before us was subsequently filed on June 2, 1977. This was after the department's decision became final. Also, the petition contains the provision that appellant does "waive all rights to appeal and judicial review of the Department's decision suspending my license in the above-noted registered case."

The department has now denied said petition for an offer in compromise and seeks to suspend the license pursuant to the final decision regarding the violations. Appellant sophistically contends that his waiver of all appeal rights did in fact waive his right to appeal the suspension imposition, yet he seeks to avoid said suspension imposition by this appeal.

We have held in previous decisions that, in the absence of a showing that such a petition was entered into through constructive fraud, inadvertence, mistake or other grounds for equitable relief, the waiver of the right of appeal is effective; none of said grounds have been raised before the board herein. (Appeals of Leonard, AB-2871 and Leybourne, AB-2884.) Moreover, if equitable rights were involved herein, appellant has not exhausted his administrative remedies because, as we stated in Appeal of Tedford, AB-1206 (at p. 4):

> "If the facts would support constructive fraud, mistake or other ground for equitable action, counsel's argument and motion should have been directed to the Department." (Emphasis added.)

We also stated in Appeal of Tedford, supra:

> "It is the opinion of this Board that an order or notice issued by the Department of Alcoholic Beverage Control under Section 23095 of the Alcoholic Beveral Control Act denying an offer in compromise is not appealable to this Board. Section 22, Article XX of the Constitution, reads in part:
>
> "'When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision * * *.'" (Emphasis added.)
>
> "Section 23080 of the Alcoholic Beverage Control Act definies 'decision':
>
> "'As used in this article "decision" means any determination of the department imposing a penalty

assessment or affecting a license which may be appealed to the board under Section 22 of Article XX of the Constitution.'" (Emphasis added.)

"Section 23081 of the Alcoholic Beverage Control Act states that an appeal may be filed within 40 days after the decision of the Department is delivered or mailed to the parties. It is the Board's opinion that the action of the Department in denying an offer in compromise is not a 'decision' as defined in Section 23080 of the Alcoholic Beverage Control Act."

Here there was no order of a penalty or suspension (see: Section 22, Article XX, California Constitution), merely a refusal by the department to modify a penalty order previously final vis-a-vis appellate review.

Finally, under the terms of section 23095, the department entertains a petition to make an offer in compromise only in cases where the decision of the department has become final; from the context of section 23095 it is apparent this means final as to all appeal rights having been terminated; the Legislature was quite clear in its expression of this requirement.

For all of these reasons, the motion of the Department of Alcoholic Beverage Control to dismiss the appeal is hereby granted.

PETER M. FINNEGAN, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Patricia Wilkey
Eugene V. Lipp